United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7032

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IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Docket No. 75-7032

BEACON CONSTRUCTION COMPANY, INC.,

Plaintiff-Appellee

v.

MATCO ELECTRIC COMPANY, INC.,
d/b/a DWYER ELECTRIC CO., INC.,

Defendant-Appellant

APPEAL FROM A JUDGMENT ENTERED IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK

BRIEF FOR MATCO ELECTRIC COMPANY, INC., d/b/a DWYER ELECTRIC CO., INC., Defendant-Appellant

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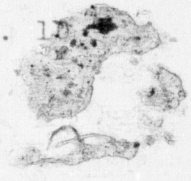

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PRELIMINARY STATEMENT

This appeal is from a judgment entered in the United States District Court for the Western District of New York, pursuant to a Decision of Hon. Harold P. Burke, United States District Judge, dated December 12, 1974.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the complaint states a claim for which relief can be granted pursuant to the New York Lien Law.

2. Whether the amount in controversy exceeds the sum of $10,000.000.

3. Whether the plaintiff is entitled to recover the bond premium from the defendant.

STATEMENT OF THE CASE

This action was commenced by the plaintiff-appellee (Beacon) against the defendant-appellant (Matco) by service of a complaint (1)[1]. seeking a judgment:

(1) Declaring the nullity of a certain notice of mechanic's lien filed by Matco, and

(2) Vacating Matco's request for a verified statement pursuant to § 76, par. 5, of the New York Lien Law.

Matco, on or about October 23, 1974, moved (7):

(1) To dismiss the complaint pursuant to Rule 12(b)(1), (6) and (7) of the Federal Rules of Civil Procedure; or, in the alternative,

(2) For summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure; or, in the alternative,

(3) For security for costs, pursuant to Rule 25 of the General Rules of the United States District Court for the Western District of New York.

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1. References are to pages of the Appendix

Shortly thereafter, Beacon served an amended complaint (18), seeking, as additional relief, a judgment:

(1) Declaring the nullity of the bond filed by it; and

(2) Awarding Beacon the cost of said bond premium, in the sum of $3,516.00

One day later, Beacon cross-moved for summary judgment (19).

The case is before this Court upon appeal from the decision of Hon. Harold P. Burke (33) granting Beacon's cross-motion and denying Matco's motion, and the corrected judgment (43) entered pursuant thereto which provided that:

Paul Place Houses, Inc. is null and void.

Company, Inc. shall recover against the defendant Matco Electric Company, Inc. d/b/a Dwyer Electric Co., Inc., $3,516.00, the premium incurred for the bond."

Matco, a subcontractor, on September 20, 1972, entered into a contract with Beacon, a general contractor, to provide, furnish and install all the labor, material and equipment for the electrical system of an apartment building located at 846 Clinton Avenue, South, Rochester, New York. Matco commenced work pursuant to the contract, and, on August 22, 1974, there was due and owing to Matco from Beacon a sum in excess of $293,000.00.

On or about August 29, 1974, Matco caused a notice of mechanic's lien to be filed in the Monroe County Clerk's Office against Beacon, and the owner of the subject property. On October 3, 1974, Beacon caused a bond to be filed in the Monroe County Clerk's Office, and, pursuant to N. Y. Lien Law §19(4), [2.] an order was entered discharging the lien.

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2. New York Lien Law Section 19(4) provides, in part:

> A lien other than a lien for labor performed or materials furnished for a public improvement specified in this article, may be discharged as follows:
>
> * * *
>
> (4) Either before or after the beginning of an action by the owner or contractor executing an undertaking with two or more sufficient sureties, who shall be freeholders, to the clerk of the county where the premises are situated, in such

sums as the court or a judge or justice thereof may direct, not less than the amount claimed in the notice of lien, conditioned for the payment of any judgment which may be rendered against the property for the enforcement of the lien. The sureties must together justify in at least double the sum named in the undertaking. A copy of the undertaking, with notice that the sureties will justify before the court, or a judge or justice thereof, at the time and place therein mentioned, must be served upon the lienor or his attorney, not less than five days before such time. Upon the approval of the undertaking by the court, judge or justice an order shall be made by such court, judge or justice discharging such lien. The execution of any such bond or undertaking by any fidelity or surety company authorized by the laws of this state to transact business, shall be equivalent to the execution of said bond or undertaking by two sureties; and where a certificate of qualification has been issued by the superintendent of insurance under the provisions of section three hundred and twenty-seven of the insurance law, and has not been revoked, no justification or notice thereof shall be necessary, and in such case a copy of the undertaking and notice of the application for an order to discharge the lien must be served upon the lienor or his attorney not less than two days before such application for such order is made.

* * *

On October 10, 1974, Beacon commenced this action to declare the nullity of the subject lien as a violation of Paragraph 14 of the terms and conditions of the contract between Beacon and Matco. [3] Beacon's amended complaint (18) also sought recovery of the sum of $3,516.00, the amount allegedly paid as a premium for the bond it filed.

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3. Paragraph 14 of the terms and conditions of the contract provides, in part:

* * *

> The Subcontractor hereby agrees that no mechanic's or other lien, notice of contract or other claims or charges shall be filed or maintained by it against the said building and improvements and real estate appurtenant thereto, or any part thereof, for or on account of any work or labor done or materials furnished under this Subcontract or otherwise, for, toward, in or about the erection and construction of said buildings and improvements and that the filing of any lien, notice of contract or other claim or charge shall be grounds for termination of this Subcontract under the provisions of Paragraph 9 above. The Subcontractor hereby formally and irrevocably releases and waives any and every mechanic's materialman's and any and every other lien, charge and claim of any nature whatsoever that it has or may at any time be entitled to have against the aforementioned buildings, improvements and real estate, together with its right to file any and every such lien, claim and charge. The Subcontractor hereby irrevocably constitutes the Contractor its agent to discharge any liens or notices of contract which may be filed by or on behalf of the Subcontractor against the property.
>
> * * *

ARGUMENT

I. THE COMPLAINT DOES NOT STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED PURSUANT TO THE NEW YORK LIEN LAW.

The sufficiency of Beacon's complaint in this action must be determined by reference to the New York Lien Law. The notice of lien filed by Matco was created and authorized by that statute. New York Lien Law §3 provides, in part:

> A contractor, subcontractor, laborer, materialman, landscape gardener, nurseryman or person or corporation selling fruit or ornamental trees, roses, shrubbery, vines and small fruits, who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent, contractor or subcontractor, shall have a lien for the principal and interest, of the value, or the agreed price, of such labor or materials upon the real property improved or to be improved and upon such

improvement, from the time of filing a notice of such lien as prescribed in this chapter.

* * *

New York Lien Law §10 provides, in part:

> Notice of lien may be filed at any time during the progress of the work and the furnishing of the materials, or, within four months after the completion of the contract, or the final performance of the work, or the final furnishing of the materials, dating from the last item of work performed or materials furnished. The notice of lien must be filed in the clerk's office of the county where the property is situated.

* * *

Beacon recognized that the provisions of the New York Lien Law apply to the notice of lien by complying with §19(4) in filing the bond to discharge the lien. However, the filing of the bond did not terminate compliance with other provisions of the Lien Law. That filing merely served to substitute the bond for the subject real property

as security for Matco's underlying claim. Other applicable provisions of the New York Lien Law (including §59, hereinafter discussed) are unaffected by the filing of a bond. (In re Euclid Concrete Corp., 106 N.Y.S. 2d 645 (Sup. Ct. 1951), rev'd on other grounds, 279 App. Div. 594, 107 N.Y.S. 2d 237 (1951).)

In the present case, Beacon sought an immediate declaration of the nullity of Matco's lien by commencing this action in the District Court. However, New York Lien Law §59 requires that a party asserting the invalidity of a lien serve a notice upon the lienor requiring commencement of an action to foreclose the lien. Specifically, §59 provides:

> A mechanic's lien notice of which has been filed on real property or a bond given to discharge the same may be vacated and cancelled or a deposit made to discharge a lien pursuant to section twenty may be returned, by an order of a court of record. Before such order shall be granted, a notice shall be served upon the lienor, either personally or by leaving it as his last known place of residence, with a person of suitable age, with directions to deliver it to the lienor. Such notice shall

require the lienor to commence an action to enforce the lien, within a time specified in the notice, not less than thirty days from the time of service, or show cause at a special term of a court of record, or at a county court, in a county in which the property is situated, at a time and place specified therein, why the notice of lien filed or the bond given should not be vacated and cancelled, or the deposit returned, as the case may be. Proof of such service and that the lienor has not commenced the action to foreclose such lien, as required in the notice, shall be made by affidavit, at the time of applying for such order.

The only way in which the validity of the lien may be determined is in an action to foreclose the lien, or upon the failure of the lienor to commence such an action after notice given pursuant to §59. The exclusiveness of these two procedures has been consistently upheld by the New York State courts. (J. B. Cieri Construction Co., Inc. v. Gramercy Construction Corp., 13 App. Div. 2d 901, 215 N.Y.S. 2d 994 (1961); Milbank-Frawley Housing Development

Company, Inc. v. Marshall Construction Co., Inc., 71 Misc. 2d 42, 335 N.Y.S. 2d 598 (Sup. Ct. 1972); Application of Joseph P. Blitz, Inc., 36 Misc. 2d 1028, 234 N.Y.S. 2d 671 (Sup. Ct. 1962).)

The Court, in J. B. Cieri Construction Co., Inc. v. Gramercy Construction Corp., supra, summarized the required procedure in the following language:

> "After the lien had been filed, Gramercy demanded its foreclosure in accordance with Section 21-a of the Lien Law and then, after the foreclosure action had been commenced, bonded the lien as it had an express right to do under the terms of the sub-contract. Neither of these procedures effected a waiver of Gramercy's right to object to the filing of the lien or to request the relief demanded on this motion. The lien having been properly filed and being regular on its face, could not be discharged on motion under subdivision 7 of Section 21 of the Lien Law. The only recourse Gramercy had was to demand foreclosure under Section 21-a and then to attack the notice of lien." (Emphasis added).

(Id., 215 N.Y.S. 2d at 996). While the subject lien in Cieri was a public improvement lien, one need only substitute §59 for 21-a, and 19 for 21, in order to apply the above language directly to the present case.

In the present case, no action has been brought to enforce Matco's lien, nor has Beacon served a notice, pursuant to §59, requiring Matco to commence such an action. Accordingly, the relief sought by Beacon was premature and unauthorized under New York law, and the complaint herein should have been dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

II. THE AMOUNT IN CONTROVERSY DOES NOT EXCEED THE SUM OF $10,000.00.

Paragraph 1 of the original complaint (1) alleged that the parties to this action were citizens of different states and that the amount in controversy exceeded the sum of $10,000.00, thereby invoking the jurisdiction of this Court under 28 U.S.C.A. §1332. This bare statement of the amount in controversy was the only allegation in the original complaint upon which jurisdiction could be based.

The amended complaint (18) sought a declaration of the nullity of [illegible] filed by Beacon and a money judgment for the bond premium - $3,516.00. (18) is the only sum in controversy claimed in the complaint, the amended complaint, or the affidavit which were submitted on the motions in the District Court. Thus, the only amount in controversy in this action was $3,516.00.

Beacon's contention that it was presently primarily liable for the penal sum of the bond is erroneous.

The bond did not constitute a present, binding obligation to pay the sum of $351,601.82, but rather provided that Beacon and/or the surety would pay "any judgment which may be rendered against the property for the enforcement of said lien, not exceeding the sum of Three Hundred Fifty-One Thousand Six Hundred One and 82/100 ($351,601.82) Dollars." Thus, the penal sum of the bond merely represented the maximum amount of security filed for an undetermined judgment.

The liability arising under the bond could not be, and was not, determined in this action. Rather, it remains unliquidated until Matco commences an action for the foreclosure of the lien, obtains a lien judgment confirming the validity of the lien, and moves against the surety on the bond to enforce the lien. The amount which the surety ultimately pays to Matco by reason of such judgment is the actual liability secured by the bond.

The bond did not create any new liability on the part of Beacon. Beacon's potential liability has always been equal to the value of the labor, materials and equipment for which payment was demanded in the notice of lien. The filing of the bond did not affect Beacon's liability for that sum. It merely added the surety's guarantee that the sum would be paid, if a judgment were so rendered.

The only liquidated amount actually in controversy in this action is the premium paid for the bond. Inasmuch as that sum - $3,516.00 - is insufficient to confer jurisdiction on this Court, Matco's motion to dismiss pursuant to Rule 12 (b)(1) of the Federal Rules of Civil Procedure should have been granted.

III. THE PLAINTIFF IS NOT ENTITLED TO RECOVER THE BOND PREMIUM FROM THE DEFENDANT.

In its amended complaint (18), Beacon sought recovery of the premium it allegedly paid for the bond filed to discharge the lien. However, while Beacon contended that it was "forced" to file the bond, this was not so. In fact, Beacon had two other alternatives available to it which would not have required paying for a bond.

First, Beacon could have served a notice, pursuant to New York Lien Law §59, requiring Matco to commence an action to enforce its lien. As noted above, this procedure would have afforded Beacon an almost immediate forum for the determination of its claim that the right to lien had been waived.

Secondly, Beacon could have exercised the right granted to it in the very section of the contract upon which it now seeks to rely. The next to last sentence of Paragraph 14 of the terms and conditions of the contract provides:

* * *

> The Subcontractor hereby irrevocably constitutes the Contractor its agent to discharge any liens or notices of contract which may be filed by or on behalf of the Subcontractor against the property.

* * *

If paragraph 14 is valid and applicable, then Beacon, as agent of Matco, could have simply filed a certificate discharging the lien. Indeed, assuming the validity of the paragraph, as asserted herein by Beacon, this remedy would appear to be the remedy intended by the parties to be exercised in the event the waiver provision was breached. It is both quick and inexpensive, and terminates the lien without litigation.

The procedure chosen by Beacon involved the expenditure of $3,516.00. In light of the other remedies available to it, Beacon cannot reasonably contend that this expenditure was a necessary and proximate consequence of the alleged breach. Indeed, Matco should not be held liable for an expenditure which could have been avoided by exercise of the very contract provision which Beacon now seeks to enforce.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the District Court should be reversed and remanded to that Court with an order to dismiss the complaint for failure to state a claim for which relief can be granted, and/or lack of subject matter jurisdiction. In the alternative, the judgment should be modified to strike the provisions thereof [illegible] the sum of $3,516.00, the premium paid for the bond.

Respectfully submitted,

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